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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

MIKE GLEASON, Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
KRISTIN K. MAYES
GARY PIERCE

IN THE MATTER OF THE FORMAL COMPLAINT OF SWING FIRST GOLF LLC AGAINST JOHNSON UTILITIES LLC.

DOCKET NO. WS-02987A-08-0049

JOHNSON UTILITIES REPLY TO SWING FIRST GOLF'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT

Snell & Wilmer
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LAW OFFICES
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Pursuant to A.A.C. R14-3-106 and Rule 56, Ariz. R. Civ. P., Johnson Utilities LLC, doing business as Johnson Utilities Company ("Johnson Utilities" or the "Company") hereby files its Reply to the Response of Swing First Golf LLC ("Swing First Golf" or "SFG") dated December 15, 2008, ("Response") to the Company's December 4, 2008, Motion for Summary Judgment ("MSJ").

I. INTRODUCTION

In its Amended Formal Complaint ("Complaint") dated February 5, 2008, Swing First Golf sets forth five specific claims for relief. Swing First Golf asks the Arizona Corporation Commission ("Commission") to order:

A. Johnson Utilities to continue to provide service during the pendency of this matter;

B. A hearing to determine the actual amount that Johnson Utilities should have charged Swing First Golf over the period November 2004 to the present compared to the amount SFG has provided Utility during this period and order a refund;

. . .

C. Johnson Utilities to stop charging Swing First Golf for the Superfund Tax;

D. Johnson Utilities to render proper bills to Swing First Golf each month, based on actual meter reads for one 3-inch meter, the effluent rate of $0.62 per thousand gallons, and the Transaction Privilege Tax of $0.067 per thousand gallons; and

E. Mr. George Johnson to apologize to Swing First Golf.

As stated in the MSJ, only three of the claims above are appropriate for a Commission complaint proceeding, and those are the claims pertaining to what rates Johnson Utilities charged Swing First Golf under its Commission-approved tariffs and whether Johnson Utilities correctly charged for meters, WQARF taxes (the so-called Superfund tax), and transaction privilege taxes (claims B, C and D above). With respect to these claims, the MSJ specifically and succinctly addresses each and demonstrates, in accordance with Rule 56, Ariz. R. Civ. P., that there are no issues of material fact in dispute. Swing First Golf's Response does not show otherwise. Thus, the Commission may decide these claims as a matter of law.[1]

However, in an attempt to defeat Johnson Utilities' MSJ, Swing First Golf asserts in its Response that (i) the MSJ is too early; (ii) there are issues of material fact in dispute (when in fact, no *relevant* facts are in dispute); (iii) the Commission has jurisdiction to interpret and enforce contracts (even though the courts have clearly held otherwise); and (iv) the Administrative Law Judge ("ALJ") does not have legal authority to grant the MSJ. Moreover, SFG inappropriately links this complaint case with its intervention in Johnson Utilities' rate case, Docket No. WS-02987A-08-0180 (the "Rate Case Docket") and alleges inaccurate and inappropriate reasons why the MSJ should not be granted which are not supported by fact or law.

. . .

[1] To the extent there are issues not directly discussed in this Reply, Johnson Utilities hereby incorporates by reference its MSJ and stands by the factual and legal arguments contained therein.

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II. JOHNSON UTILITIES' MOTION FOR SUMMARY JUDGMENT IS TIMELY AND ADDITIONAL DISCOVERY IS UNNECESSARY.

Swing First Golf's Response states that summary judgment is not appropriate before a party has had the opportunity to complete discovery. SFG filed its Complaint on February 5, 2008. It did not issue its first set of data requests until April 11, 2008. Following the resolution of a dispute between the parties regarding the responses to these data requests, and after the parties took time to attempt to work out a settlement, Johnson Utilities completed providing responses to Swing First Golf on October 17, 2008. From the filing of its Complaint on February 5, 2008, until today, Swing First Golf has issued only this one set of data requests. SFG has had every opportunity to issue additional sets of data requests and conduct depositions at any time. Instead, more than ten months have passed and Swing First Golf has issued one set of data requests. SFG is now asserting that it needs more time to conduct additional discovery in this matter, and cites its Motion to Compel filed in the *Rate Case Docket* in an attempt to ascribe improper conduct on the part of Johnson Utilities in this Complaint case. Swing First Golf's intervention in the Rate Case Docket should have nothing to do with this Complaint case, and there is absolutely no basis for allowing SFG to use the *Rate Case Docket* to oppose the grant of summary judgment in this case.[2]

Next, Swing First Golf cites to the affidavit from its legal counsel attached to the Response which states that Swing First Golf cannot obtain facts essential to justify its opposition to the MSJ. The affidavit cites three reasons why SFG needs additional discovery, which are:

a. Swing First Golf needs additional responses in the *Rate Case Docket*;

b. Swing First Golf is anticipating more rounds of discovery in *both* this docket and in the rate case docket; and

[2] Johnson Utilities submits that Swing First Golf's repeated attempts to link the Rate Case Docket to this Complaint case, and vice versa, is an abuse of the Commission's limited resources and should not be permitted to continue.

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c. Swing First Golf anticipates taking depositions.

A party requesting a Rule 56(f) continuance of the court's consideration of summary judgment in order to have additional time to obtain evidence must submit an affidavit that includes all of the following: (1) the specific evidence that is beyond the party's control; (2) the location of the evidence; (3) what the party believes the evidence will reveal; (4) how the evidence can be obtained; and (5) how long it will take to acquire the additional evidence. *Simon v. Safeway, Inc.*, 217 Ariz. 330, 333, 173 P.3d 1031, 1034 (App. 2007). Additionally, "the mere hope or speculation that the discovery process will uncover evidence sufficient to defeat a motion for summary judgment is an insufficient basis for denying the motion." *Camoin v. Custom Computer Specialists, Inc.*, 843 N.Y.S. 2d 467, 468 (App. Div. 2007). Swing First Golf's Rule 56(f) claim fails to meet these requirements, as discussed below.

A. **Swing First Golf does not specify the evidence that is beyond its control.**

Swing First Golf fails to describe what additional evidence discovery would reveal in this Complaint case. Instead, SFG's Rule 56(f) affidavit states only that (i) SFG needs answers to data requests that were issued in a separate docket (*i.e.*, the *Rate Case Docket*); (ii) SFG has data requests that have yet to be issued; and (iii) SFG wants to take depositions that have yet to be noticed. Swing First Golf cannot defeat a motion for summary judgment simply by making non-specific assertions regarding the alleged need for additional discovery in this docket or in another docket. Rather, a party seeking to delay the court's ruling on a motion for summary judgment under Rule 56(f) must provide specific reasons to support the delay. *Boatman v. Samaritan Health Services, Inc.*, 168 Ariz. 207, 212, 812 P.2d 1025, 1030 (App. 1990). Swing First Golf's reference to, and its attachment of, its Motion to Compel in the Rate Case Docket is wholly irrelevant and serves only to distract from the claims at issue in this Complaint case.

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Moreover, Swing First Golf's counsel has failed to demonstrate what he believes the evidence will reveal in his Rule 56(f) affidavit.

B. **Swing First Golf does not provide any time estimate on obtaining the additional discovery.**

Swing First Golf fails to provide a time estimate as to how long it will take to obtain the additional evidence. Rather, SFG alleges that Johnson Utilities has not provided timely or adequate responses to data requests in a separate docket, and that SFG as a result cannot provide any sort of time estimate in this case. In addition, SFG claims that it needs to issue additional data requests and take depositions, but fails to state when it intends to follow up on this additional discovery. These deficient arguments are wholly inadequate in satisfying the requirements of Rule 56(f), and should be rejected.

C. **Swing First Golf already has possession of the evidence relevant to its Complaint case.**

All the evidence that Swing First Golf needs to support its alleged claims against Johnson Utilities is already in its possession, including copies of water bills issued by the Company to SFG which show how much SFG has been billed and which reflect the application of billing credits by the Company and a copy of the Company's tariffs, which are public documents. Moreover, all relevant documents in this Complaint case were attached to the Company's MSJ. No additional discovery is required to resolve the claims raised by Swing First Golf.

D. **Swing First Golf has already had a reasonable opportunity to prepare its case.**

Swing First Golf has had more than ten months to conduct discovery in this matter, but has issued only one set of data requests and failed to take any depositions. In *Deutsche Credit Corporation v. Case Power & Equipment Company*, the Arizona Court of Appeals denied a Rule 56(f) continuance where the party requesting the Rule 56(f)

continuance already had nine months to conduct discovery but conducted none. *Deutsche Credit Corp. v. Case Power & Equipment Co.*, 179 Ariz. 155, 161, 876 P.2d 1190, 1196 (App. 1994). Like *Deutsche Credit Corporation*, Swing First Golf's request for a Rule 56(f) continuance should not be granted because SFG has failed to issue additional discovery or notice depositions for the last ten months.

III. THERE ARE NO ISSUES OF MATERIAL FACT IN DISPUTE AND SUMMARY JUDGMENT MAY BE GRANTED AS A MATTER OF LAW.

Swing First Golf offers no legal justification as to why the Commission cannot grant Johnson Utilities' MSJ other than boldly alleging that issues of material fact are in dispute as set forth in SFG's Counterstatement of Facts, which is supported by the unexecuted affidavit of David Ashton. However, it is clear from the Ashton affidavit that the alleged issues of fact in dispute are not relevant or necessary for the Commission to make a legal determination on the claims set forth in the Complaint. For example, paragraph 24 of the affidavit misrepresents facts by stating that "Mr. Tompsett paid Swing First for the Oasis Golf Club liquor license by a check drawn on Utility" which is not the case.[3] Even if it was true, it is not relevant to the five claims for relief outlined in the Complaint. The affidavit is replete with these kinds of statements in blatant attempt to link this complaint matter with the *Rate Case Docket*. Moreover, in an obvious effort to distract the Commission from the issues related to this case, SFG's attaches its unrelated Motion to Compel which is full of unsubstantiated allegations and amounts to nothing more than an attempt to "throw as much as possible up against the wall in the hope that something will stick."[4] The Motion to Compel also includes as attachments, articles that disparage the Company that have no relevance whatsoever to the five legal

[3] *See* Attached Exhibit A which is a check from the account of The Club at Oasis, LLC and not Johnson Utilities that paid, in part, for the liquor license.

[4] In order to provide Johnson's Utilities' perspective on this Motion to Compel, and to provide context given the inappropriateness of the form and content of that filing, the Company's Response has been attached hereto as Exhibit B.

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claims for relief alleged in the Complaint or to the Commission's legal determination as to whether summary judgment is appropriate in this matter.

All of Swing First Golf's purported relevant claims against the Company relate to whether Swing First Golf was billed correctly for the utility services provided by the Company. These claims can be settled by the Commission making the following determinations based on law, not in fact, including: (1) the Company should and must bill Swing First Golf according to the tariffs on file with the Commission;[5] (2) the Company and Swing First Golf do not have a Commission-approved special contract in place that would allow the Company to charge SFG utility rates for services different than the Company's tariff rates; and (3) the WQARF tax assessed by the Company is appropriate.

IV. THE COMMISSION DOES NOT HAVE JURISDICTION TO INTERPRET AND ENFORCE CONTRACTS.

Arizona law is very clear that issues of contract interpretation are outside the scope of the Commission's jurisdiction. Swing First Golf in its Response is asking the Commission to interpret the language and intent of the Utility Service Agreement, and the enforceability of an unsigned Letter of Understanding to which the Company is not a party, a task which is designated exclusively for the courts. *See, Trico Electric Coop. v. Ralston*, 67 Ariz. 358, 363, 196 P.2d 470, 473 (1948); *Trico General Cable Corp. v. Citizens Utilities Co.*, 27 Ariz. Ct. App. 381, 385, 555 P.2d 350, 354 (Ct. App. 1976). The Response erroneously cites a Registrar of Contractors case for the proposition that the Commission has jurisdiction to interpret contracts. To this end, Swing First Golf relies on *J.W. Hancock Enterprises, Inc. v. Arizona State Registrar of Contracts*, 142 Ariz. 400, 690 P.2d 119 (Ct. App. 1984), which involved a dispute between home buyers and a licensed contractor. Contrary to Swing First Golf's accusation that Johnson Utilities failed to cite *Hancock*, the instant case is not affected by the *Hancock* decision.

[5] This includes the monthly minimum charges for a CAP meter.

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While the Court of Appeals allowed the Registrar of Contractors to review an ancillary contractual issue, it specifically distinguished the authority of the Registrar of Contractors from that of the Commission: "[t]he Corporation Commission, had they been permitted to pass on the validity of the contracts in question [in Trico and General Cable], would not have been exercising ancillary powers, but direct adjudicatory powers." *Id.* at 408, 690 P.2d at 127. Such adjudicatory powers relating to contract construction and interpretation are reserved to the courts and not the Commission. Additionally, the court limited its holding to the fact that the issue in dispute was an ancillary question valued at only $195, noting that if "there is a bona fide dispute as to the terms of the agreement or the meaning of the agreed upon terms, it is urged that the Registrar must await a resolution of this type of dispute by a court." *Id.* at 406, 690 P.2d at 125. Swing First Golf is simply wrong in its argument that the Commission has jurisdiction over contract disputes. "[T]he construction and interpretation ... under a contract resides solely with the courts and not with the corporation commission." *General Cable*, 27 Ariz. Ct. App. at 385, 555 P.2d at 354.

Moreover, the Response fails to refute either *Trico* or *General Cable*. Rather, it merely asserts that *Trico* and *General Cable* are unrelated to a utility rates and services contract. *Trico,* however, involved a contract for the purchase of utility infrastructure, *Trico*, 67 Ariz. at 360, 196 P.2d at 471, and *General Cable* involved a dispute over allegedly discriminatory rates charged by a utility company. *General Cable*, 27, Ariz. App. at 385, 555 P.2d at 354. Both cases are more related to the Utility Services Agreement and the Letter of Understanding than the Registrar of Contractors case cited by Swing First Golf. In this Complaint matter currently before the Commission, as in *General Cable*, Swing First Golf is asking the Commission to construe a utility services

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contract and a management contract. But as both *Trico* and *General Cable* illustrate, the Commission is without jurisdiction to undertake such a review.[6]

Finally, the Response indicates that Johnson Utilities is asking for a result that is inconsistent with Judge Dunevant's Minute Order in Docket CV2008-000014. To the contrary, and entirely consistent with Judge Dunevant's conclusion that the Superior Court matter should wait until after the Commission has issued its "*initial determination*," Johnson Utilities is merely requesting that the Commission determine the relevant rate issues as a matter of law. The interpretation and enforceability of the Utility Service Agreement and the Letter of Understanding (neither of which were ever submitted to the Commission) is outside of the Commission's jurisdiction. Therefore, the Maricopa County Superior Court will be able to move forward to address these issues following the Commission's initial determinations on the rate issues.

V. THE ALJ HAS AUTHORITY TO RECOMMEND THAT THE COMMISSION GRANT SUMMARY JUDGMENT THROUGH A PROPOSED ORDER TO THE COMMISSION.

Johnson Utilities does not dispute Swing First Golf's position that if the Administrative Law Judge wishes to take dispositive action on the Company's MSJ, the proper procedure would be for the ALJ to draft and file a Recommended Opinion and Order for the Commission's consideration at an Open Meeting.

VI. CONCLUSION.

In its MSJ and this Reply, Johnson Utilities has clearly demonstrated the legal and factual basis in order for the Commission to consider and grant the MSJ. Despite Swing First Golf's attempts to (i) *create* issues of material fact; (ii) further disparage the Company by filing in the docket unsubstantiated news articles and hearsay;

[6] Even if the Commission found that it was within its jurisdiction to interpret the Utility Services Agreement, for the reasons set forth in the MSJ, the language in the Utility Services Agreement is unambiguous as it relates to what Johnson Utilities is required to charge for utility services.

and (iii) link this Complaint case with the *Rate Case Docket*, there are no issues of material fact in dispute that would preclude the Commission from making a determination on the Company's MSJ. Additional discovery (or an evidentiary hearing on this matter) will not change this. The mere fact that Swing First Golf claims something to be true does not make it true.[7] This case boils down to whether Johnson Utilities has charged Swing First Golf consistent with its obligations as a public utility. The evidence and other information submitted with the Company's MSJ and this Reply provides all of the necessary documentation for the Commission to make this determination and determine whether the Company has charged Swing First Golf in accordance with its Commission-approved tariffs and whether Swing First Golf has underpaid Johnson Utilities. Moreover, to the extent that Swing First Golf believes that Johnson Utilities has breached either the Utility Services Agreement or the unsigned Letter of Understanding, following this proceeding, Swing First Golf must seek redress through the Superior Court proceeding as the Commission does not have authority to interpret or enforce contracts for the reasons detailed herein and in the MSJ.

RESPECTFULLY submitted this 23rd day of December, 2008.

SNELL & WILMER

By: _____

Jeffrey W. Crockett
Bradley S. Carroll
400 East Van Buren
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Attorneys for Johnson Utilities, LLC

[7] For example, the Response still maintains this nonsensical notion that the Commission has some form of jurisdiction over Mr. Johnson merely because he owns the utility and the Commission could fine the utility if Mr. Johnson does not issue an apology to Swing First Golf. (Response at page 11 lines 23-25, page 12 lines 1-3.

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ORIGINAL and thirteen (13) copies of the foregoing filed this 23rd day of December, 2008.

COPY of the foregoing hand-delivered this 23rd day of December, 2008 to:

Ernest Johnson, Director
Utilities Division
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, Arizona 85007

Robin Mitchell, Staff Attorney
Legal Division
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, Arizona 85007

Yvette B. Kinsey, Administrative Law Judge
Hearing Division
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, Arizona 85007

COPY of the foregoing sent via U.S. Mail and E-Mail this 23rd day of December, 2008 to:

Craig A. Marks
Craig A. Marks, PLC
10645 N. Tatum Blvd., Suite 200-676
Phoenix, Arizona 85028
Craig.Marks@azbar.org
Attorney for Swing First Golf LLC

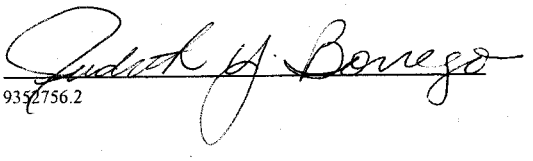

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EXHIBIT A

THE CLUB AT OASIS, LLC

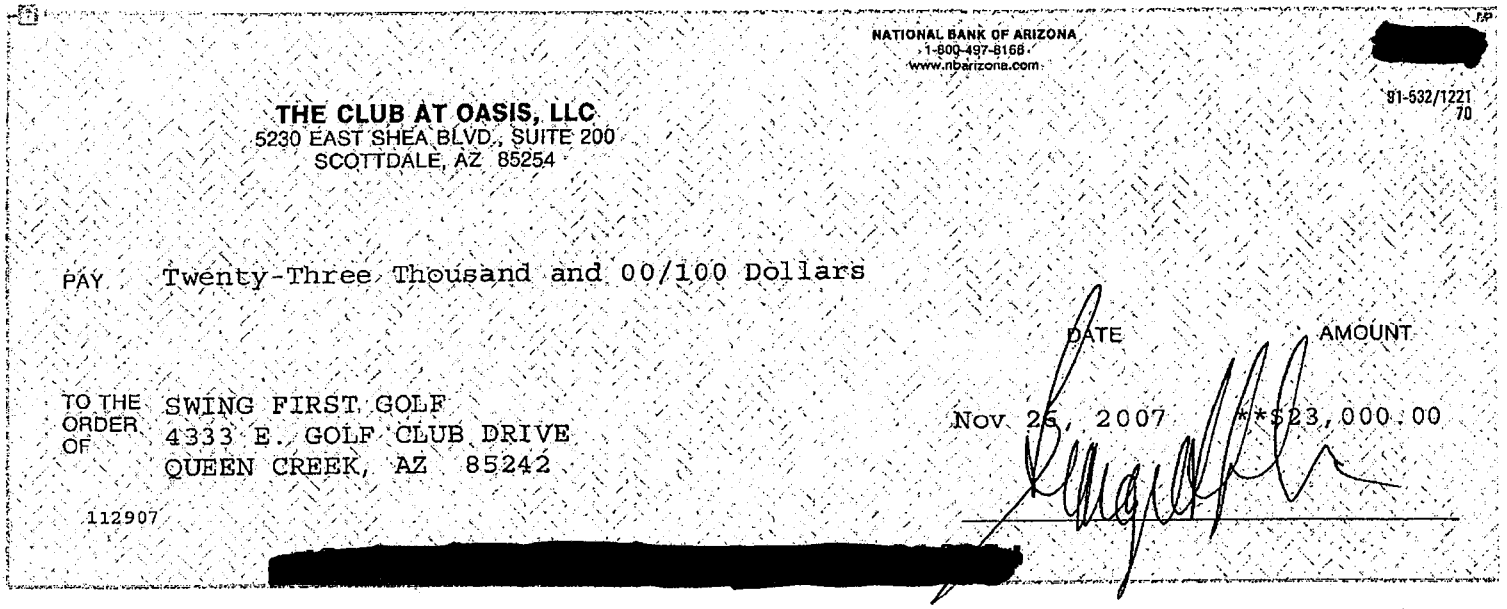
SWING FIRST GOLF

5305

Check Number: 5305
Check Date: Nov 26, 2007

Check Amount: $23,000.00

Item to be Paid - Description	Discount Taken	Amount Paid
112907		23,000.00



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[redacted]

91-532/1221
70

THE CLUB AT OASIS, LLC
5230 EAST SHEA BLVD., SUITE 200
SCOTTDALE, AZ 85254

PAY Twenty-Three Thousand and 00/100 Dollars

DATE AMOUNT

TO THE ORDER OF SWING FIRST GOLF
4333 E. GOLF CLUB DRIVE
QUEEN CREEK, AZ 85242

Nov 26, 2007 **$23,000.00

112907

[redacted]

THE CLUB AT OASIS, LLC

SWING FIRST GOLF

5305

Check Number: 5305
Check Date: Nov 26, 2007

Check Amount: $23,000.00

Item to be Paid - Description	Discount Taken	Amount Paid
112907		23,000.00

Swing First
$8000 - Liquor license
$4000 - equipment
$11,000 - Advertising Banners / Marketing

EXHIBIT B

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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

MIKE GLEASON – Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
KRISTIN K. MAYES
GARY PIERCE

IN THE MATTER OF THE APPLICATION OF JOHNSON UTILITIES, LLC, DBA JOHNSON UTILITIES COMPANY FOR AN INCREASE IN ITS WATER AND WASTEWATER RATES FOR CUSTOMERS WITHIN PINAL COUNTY, ARIZONA.

DOCKET NO. WS-02987A-08-0180

JOHNSON UTILITIES COMPANY'S RESPONSE TO SWING FIRST GOLF L.L.C.'S MOTION TO COMPEL

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On November 21, 2008, Intervenor Swing First Golf LLC ("Swing First") filed with the Arizona Corporation Commission ("Commission") a Motion to Compel ("Motion") against Johnson Utilities Company ("JU" or "Company") in the above-captioned matter. Swing First's Motion is a thinly veiled attempt by a disgruntled customer to inflict harm upon JU. Swing First is currently involved in a Commission complaint proceeding against the Company in Docket No. WS-02987A-08-0049 ("Complaint Proceeding") and appears to be using this rate case to bolster its position in the Complaint Proceeding in the hope of JU capitulating to its demands. The tone and tenor of the Motion is one that is rarely seen at the Commission and should be considered an abuse of Commission process. The Motion is inflammatory, inappropriate, inaccurate, without merit, violates Rule 37(a)(2)(C) of the Arizona Rules of Civil Procedure, and is inconsistent with the spirit and intent of the Commission's August 15, 2008, Rate Case Procedural Order ("Procedural Order"). Accordingly, for the reasons set forth in this Response, Swing First's Motion should be denied.

The Background Section of the Motion is Inflammatory and Inappropriate for a Motion to Compel

The purported purpose of the Motion is for Swing First to obtain discovery in preparation for the April 23, 2009, hearing on JU's rate case application. Yet, the first nine (9) pages of Swing First's Motion is page after page of what can only be described as diatribe and "bashing" of JU, its affiliates, and its owner, George H. Johnson, based on irrelevant and unsubstantiated allegations. Moreover, Swing First attached to its Motion an additional 17 pages containing various news articles relating to JU and its affiliates. Rather than dignify these allegations by reiterating them in this Response, JU maintains that the inclusion of these allegations and news articles is not for the purpose of obtaining necessary and relevant discovery, but rather to: (i) inflame the situation by ascribing improper motives to JU; (ii) put into the public docket information that is not subject to evidentiary rules or subject to cross examination; (iii) provide a preview of positions it may take in the rate case that would otherwise be precluded as outside the scope of the rate case; (iv) bolster its position in the Complaint Proceeding; and (v) influence the Commission's view of JU in the hope that the Commission will lower the rates that Swing First is obligated to pay.

The basis for Swing First's intervention is set forth in its June 10, 2008, Motion to Intervene. Swing First stated to the Commission in its Motion to Intervene that:

> Swing First owns and operates the Golf Club at Johnson Ranch. Johnson Utilities delivers and sells treated effluent to Swing First in accordance with Commission-approved rates and tariffs. No other party can adequately represent Swing First's interests concerning these rates and adequacy of Johnson Utilities' service.

The allegations and news articles attached to the Motion neither have relevance to Swing First's stated interest in this proceeding, nor are they designed to elicit relevant

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discovery for purposes of presenting its February 4, 2009, testimony and associated exhibits as required by the Procedural Order. Accordingly, the Commission should give no consideration or weight to this background section.

The Motion Does not Comply with the Rules of Civil Procedure or the Procedural Order

Rule 37(a)(2)(C) *requires* that:

> No motion [to compel] brought under this Rule 37 will be considered or scheduled unless a separate statement of moving counsel is attached thereto certifying that, after personal consultation and good faith efforts to do so, counsel have been unable to satisfactorily resolve the matter.

The Procedural Order states:

> IT IS FURTHER ORDERED that, in the alternative to filing a written motion to compel discovery, any party seeking resolution of a discovery dispute may telephonically contact the Commission's Hearing Division to request a date for a procedural hearing to resolve the discovery dispute; that upon such a request, a procedural hearing will be convened as soon as practicable; ....[1]

Footnote 2 of the Procedural Order states that "the parties are encouraged to attempt to settle discovery disputes through informal, good-faith negotiations before seeking Commission resolution of the controversy." (Emphasis added.)

The Motion does not contain a separate statement by Swing First certifying that it has been unable to satisfactorily resolve the matters relating to the data request responses for which Swing First takes issue. Instead, it spends nine (9) pages assiduously "bashing" JU before getting to any semblance of a legal argument. Moreover, despite the fact that Swing First's testimony is not due until February 4, 2009, it chose to ignore the Procedural Order's admonition for the parties to first try to resolve such matters between

[1] Procedural Order at page 4, lines 13-16.

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themselves and, if unsuccessful, to seek resolution through the Hearing Division before proceeding to file a motion to compel. Instead of attempting to resolve its issues, Swing First spent its time preparing and filing its 38-page Motion. Because Swing First failed to comply with Rule 37 of the Rules of Civil Procedure or first avail itself of the informal process to resolve its discovery issues, the Motion should be denied.

The Company Has Not Waived Any Discovery Objections

The Procedural Order provides that any objection to discovery requests shall be made within seven (7) calendar days of receipt. The Procedural Order does not provide that as a matter of law, a party is deemed to have waived its right to make an objection by not making an objection within the timeframe.

JU does not deny that it was late in providing its objections. However, it should be noted that with respect to 5 of the 14 data requests referenced in the Motion in which JU made an objection, to the extent JU did make an objection to preserve its rights, it also made a good-faith effort to still provide what it considered to be an appropriate response.[2] Moreover, JU has been trying to keep up with its responses to the numerous data requests propounded by Staff and Swing First. JU is doing the best it can to respond to data requests as soon as possible while conducting utility operations.

The Administrative Law Judge ("ALJ") is not required to find that JU has waived its right to object to a data request by making its objection after the deadline. The ALJ has discretion to weigh the prejudicial effect of admitting the disclosure. The disclosure rules are not intended to create a "weapon" for dismissing cases on a technicality. *Zimmerman v. Shakman*, 204 Ariz. 231, 235, 62 P.3d 976, 980 (Ariz. Ct. App. 2003). The disclosure rules are designed to provide "a reasonable opportunity to prepare for trial or settlement – nothing more, nothing less." *Bryan v. Riddel*, 178 Ariz. 472, 476, 875 P.2d

[2] It is unclear why Swing First included 1.5 in its Motion since JU provided the requested information five (5) weeks before Swing First filed its Motion.

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131, 135 n.5 (1994). The disclosure rules "should be interpreted to maximize the likelihood of a decision on the merits." *Allstate Ins. Co. v. O'Toole*, 182 Ariz. 284, 287, 896 P.2d 254, 257 (1995). Each situation must necessarily be evaluated on its own facts. *Id.* at 288, 896 P.2d at 258 (noting that "[d]elay, standing alone, does not necessarily establish prejudice"). Finally, given the nature of the discovery process at the Commission, the Commission's past practice has been flexible in providing parties additional time when necessary and appropriate.

The hearing in this matter is set for April 23, 2009. Swing First's testimony is not due until February 4, 2009. Under the current facts and circumstances, even though JU made several objections subsequent to the seven (7) day timeframe, JU has not waived its right to raise relevant and appropriate objections to data requests nor is the ALJ required to make such a finding.[3]

The Company's Objections are Not Meritless

To date, JU has received a total of 185 data requests (not counting subparts) from Staff and Swing First and has provided thousands of pages of documents in response. Of the 185 data requests, Swing First has propounded a total of 40 data requests to JU, of which the Company has only objected to 9 of those requests set forth in the Motion without providing a response. For each of those objections, JU has fully explained the legal basis for its objection. Those objections are set forth in the Motion.

As discussed above, Swing First has made no effort to enter into informal good-faith discussions with JU to try to resolve the objections. Some of the data requests solicit information not related to the scope of the rate case. Rather than go through each and every objection in this Response, JU will provide a representative example of a Swing

[3] It should be noted that JU responded to Swing First's 1st, 2nd and 3rd sets of data requests on September 18, October 1, and October 22, 2008, respectively. Yet, Swing First waited until November 21, 2008, to file its Motion, which covers objections to responses from all three sets of data requests.

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First "legal" argument as to why it is entitled in a *rate case* to the information requested for which JU has objected.

Data Request 3.5, set forth in the Motion, asks JU to:

> *Please admit or deny that Utility's affiliated entity and/or George Johnson filed a defamation lawsuit or counterclaim against Arizona Attorney General Terry Goddard and/or his office.*

JU's objection is as follows:

> *Johnson Utilities objects to this data request on the grounds that legal action filed by affiliates of Johnson Utilities and/or George Johnson are not relevant to the rate case and are outside the scope of discovery. Johnson Utilities further asserts that legal pleadings filed in courts of law are public documents, which speak for themselves.*

Swing First's strained, inflammatory, and inappropriate attempt to justify the relevance in its Motion is as follows:

> *As discussed above, Utility is part of the Johnson Group, all of which are controlled by George Johnson. Utility admits that Mr. Johnson is its ultimate decision maker. Therefore, Mr. Johnson's other activities-especially those consistent with Utility's use of the courts to harass and intimidate customers-are relevant to the inquiry as to whether Utility is a fit and proper entity to hold its CC&N and the amount of rate increase justified in light of Mr. Johnson's and Utility's conduct. For example, if Mr. Johnson had been convicted of a felony such as fraud, it is unlikely that the Commission would allow him to participate in Utility's management, or to allow him to continue to own Utility. Similarly, given Mr. Johnson's reckless management of his other companies, his disregard for Arizona's environment and his heritage, his shameful treatment of his own customers, and his continued flouting of Commission orders, the Commission may well conclude that it is time for Mr. Johnson to go. It is certainly not time to let Mr. Johnson profit from these actions.*

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This "legal" justification to challenge JU's objection is nothing more than the "bashing" of JU and its affiliates as discussed above. It speaks to whether JU is a "fit and proper entity" to hold a CC&N which is irrelevant to the rate proceeding. It uses an inappropriate example such as "if Mr. Johnson had been convicted of a felony such as fraud," where no basis for such an inflammatory statement exists. It makes unsupported allegations regarding JU and Mr. Johnson. These statements, replete throughout the Motion, have no bearing whatsoever on whether JU has made an inappropriate objection under Arizona law or Commission practice.

JU's objections speak for themselves. All of JU's objections have proper legal foundation, and the Company was prepared to discuss each and every one of them with the ALJ had Swing First requested a procedural hearing to resolve this dispute. If the ALJ does not summarily dismiss the Motion, JU is prepared to defend each and every objection at a proceeding relating to the Motion.

Conclusion

On the basis of the foregoing, JU requests that Swing First's Motion be summarily denied. In the alternative, JU requests the opportunity for oral argument at a proceeding on the Motion to further demonstrate that its objections have been duly made and that the Motion should be denied.

RESPECTFULLY SUBMITTED this 2nd day of December, 2008.

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